Service Employees Union, Local 87, Service Employees International Union, AFL–CIO *and* Cresleigh Management, Inc. and GMG Janitorial Maintenance, Inc. Cases 20–CC–3284, 20–CC–3287, and 20–CC–3290

October 20, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On May 3, 1996, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Parties each filed an answering brief to the Respondent's exceptions, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge denied the Respondent's motion to dismiss the instant complaints on the basis of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and *Peyton Packing Co.*, 129 NLRB 1358 (1961), and found that the issues in the instant cases are sufficiently unrelated to those in Case 20–CB–9949 so as to withstand the motion to dismiss. The Respondent has excepted to this finding. We find no merit in this exception for the following reasons.

The General Counsel has wide discretion in determining whether or not to consolidate or sever proceedings. Section 102.33 of the Board's Rules and Regulations provides that:

> (a) Whenever the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he . . . may, at any time after a charge has been filed with a Regional Director . . . order that such charge and any proceeding which may have been initiated with respect thereto:
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> . . . .
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> (2) Be consolidated with any other proceeding which may have been instituted in the same Region; or
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> (3) Be transferred to and continued in any other Region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other Region; or
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> (4) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

The language of Section 102.33—that the General Counsel may, if he thinks it necessary to effectuate the Act's purposes or to avoid unnecessary costs or delay, consolidate or sever proceedings—clearly affords the General Counsel wide discretion in these matters, as befits a party exercising prosecutorial discretion. This language is not mandatory; it is not even hortatory. It says that the General Counsel may do as he thinks best. Indeed, the Board long ago held that the General Counsel's decision whether or not to consolidate is subject to review only for arbitrary abuse of discretion. *Teamsters (Overnite Transportation Co.)*, 130 NLRB 1020, 1022 (1961).

The General Counsel's discretion is not unbounded, however. In *Peyton Packing Co.*, the Board dismissed portions of a complaint alleging that the employer had violated Section 8(a)(5) of the Act by withholding a bonus from employees and that this unlawful act was the cause of the employees' subsequent strike. The General Counsel had previously issued a complaint alleging the same conduct, i.e., withholding the bonus, had violated Section 8(a)(1) and that the same strike was, for other reasons, an unfair labor practice strike. The Board stated that

> [t]he General Counsel, in short, made an election . . . as to the path he would take in proving that the Respondent violated the Act [by withholding the bonus], and thereby had caused an unfair labor practice strike. Having failed in his proof, we cannot condone the General Counsel's effort to take a different path to achieve what he failed to do in the first instance.

Id. at 1361. The Board also stated:

> Generally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in unnecessary harassment of respondents.

Id at 1360.

In *Jefferson Chemical*, the Board applied these principles to preclude the General Counsel from litigating a complaint alleging that an employer had engaged in surface bargaining where a prior complaint had previously been litigated alleging that the employer had violated Section 8(a)(5) by making unilateral changes

[1] In finding the violation in Case 20–CC–3290, Member Fox relies solely on the patrolling and picketing of the bank entrance (a reserved gate entrance) at 711 Van Ness Avenue by one of the union agents.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

in employment conditions during the same period of time as the alleged surface bargaining. The original charge had broadly asserted a refusal to bargain by the employer, and the General Counsel had specifically disclaimed at the first hearing any intent to establish general bad-faith bargaining on the employer's part. The Board held that the General Counsel was duty bound to investigate all 8(a)(5) matters encompassed by the original charge and to ''proceed appropriately thereafter.'' *Jefferson Chemical*, 200 NLRB at 992 fn. 3. In those circumstances, the General Counsel's attempt to litigate the surface bargaining issue in the second case, after having failed to do so in the first case, led to ''multiple litigation of issues which should have been presented in the initial proceeding [that] constitutes a waste of resources and an abuse of our processes[.]'' Id.

As the Board has subsequently made clear, however, the sound principle favoring consolidation of pending allegations in one proceeding is not absolute. In *Maremont Corp.*, 249 NLRB 216, 217 (1980), for example, the Board rejected the respondent's claim that the General Counsel was precluded from litigating allegations in the complaint based on their proximity in time to a prior hearing involving that respondent. The first hearing involved allegations of threats, promises, and interrogations of employees. At the start of the hearing, the General Counsel sought to include an allegation that the respondent had unlawfully threatened employees with reprisals if they missed work to testify under subpoena at the Board hearing; however, the administrative law judge denied the motion. The Board distinguished *Peyton Packing* on the grounds that in that case, the General Counsel tried to relitigate a matter which the General Counsel had already brought to hearing. The Board noted further that to prohibit the General Counsel from litigating allegations occurring close in time to a prior hearing involving the same respondent would restrict the General Counsel's legitimate exercise of discretion in handling complaints.

In *Harrison Steel Castings Co.*, 255 NLRB 1426, 1427 (1981), the Board rejected the respondent's contention that *Peyton Packing* required dismissal of a complaint that was based on a charge filed while a hearing on a prior complaint was in progress. The Board stated that

> [t]o accept the Respondent's argument that the General Counsel be compelled to litigate all unfair labor practices occurring during the pendency of litigation of other unfair labor practice charges against the same respondent would not only severely restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct. Such a result is completely at odds with the purposes and policies of the Act.

The Board also found that the second complaint, which involved the termination prior to the first hearing of an employee who testified in the first hearing concerning alleged threats by the respondent, was not ''intertwined'' with the first proceeding.[3]

Thus, *Peyton Packing* and *Jefferson Chemical* establish that the Board generally will not permit the General Counsel to relitigate the lawfulness of specific conduct in separate proceedings by asserting that the conduct violates different sections of the Act, and that a decision on the part of the General Counsel not to include conduct encompassed by a pending charge in the complaint may bar a subsequent complaint concerning that conduct. As *Maremont* and *Harrison Steel Castings* make clear, however, the Board does not construe those principles to require that charges filed during the pendency of another unfair labor practice proceeding involving the same respondent must be consolidated into that proceeding regardless of the circumstances. To the contrary, except in the specific circumstances presented in *Peyton Packing* and *Jefferson Chemical*, where the General Counsel has attempted to ''twice litigate the same act or conduct *as a violation of different sections of the Act*,'' *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962) (emphasis in original), or to relitigate the same charges in different cases, the Board has recognized that such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases. *Maremont*, 249 NLRB at 217; *Harrison Steel Castings*, 255 NLRB at 1427.

In any event, the General Counsel's decision on whether to consolidate cases is not necessarily the last word on the subject. Section 102.35(a)(8) of the Board's Rules and Regulations provides that the administrative law judge in an unfair labor practice case has the authority, on motion by a party, to order proceedings consolidated or severed. The judge has the discretion to determine when consolidation, or severance, of any complaint is warranted, considering such factors as the risk that matters litigated in the first proceeding will have to be relitigated in the second and the likelihood of delay if consolidation, or severance,

[3] Other decisions indicate that issues normally must be consolidated if they are sufficiently closely related. See, e.g., *Highland Yarn Mills*, 310 NLRB 644 (1993), vacated as moot 315 NLRB 1169 (1994); *Best Lock Corp.*, 305 NLRB 648 (1991). We think such statements are inconsistent with the thrust of other decisions and with the broad discretion afforded the General Counsel in these matters, and we overrule those decisions insofar as they are at variance with the discussion above. Naturally, the relatedness of issues is a factor that may inform the General Counsel's exercise of discretion in determining whether consolidation is warranted.

is granted. Thus, even if the General Counsel elects not to consolidate two or more cases involving a party, any party who feels harassed or prejudiced by the prospect of separate trials can move for consolidation and have the issue determined by the judge.

Our dissenting colleague nevertheless would dismiss the complaint because he finds that the General Counsel improperly failed to consolidate it with the complaint in Case 20–CB–9949. He would, except in a number of circumstances not present here, follow the Board's dictum in *Peyton Packing* and require that all outstanding complaints be consolidated in one proceeding.

We reject our colleague's position, which is not grounded in the language of the Act and is flatly inconsistent with the broad discretion afforded the General Counsel in these matters in the Board's Rules and Regulations. It is based instead on dictum in cases which, as we have explained, involved attempts by the General Counsel either to relitigate issues that had been litigated in previous proceedings or to litigate, for the first time, issues that were encompassed by a previous charge and that could have been litigated in an earlier proceeding but for the General Counsel's choice to proceed on a narrower basis. As subsequent decisions make clear, *Peyton Packing* and *Jefferson Chemical* simply do not stand for the broad proposition that our colleague espouses.

We share our colleague's concern for efficient casehandling, conservation of the Board's resources, and avoiding harassment of or prejudice to respondents, and we have no doubt that the General Counsel does, too. We also expect that, in the great majority of cases, the General Counsel's desire to achieve those ends would lead him to consolidate outstanding issues for trial, rule or no rule. Unlike the dissent, however, we are unwilling to assume that consolidation will serve those ends in every case, and we have confidence in the General Counsel's ability to discern when it will do so and when it will not. The Board has historically taken this view. That is why its Rules and Regulations have long afforded the General Counsel broad discretion, subject to review only for arbitrary abuse, in determining whether to consolidate pending cases. As any other party may appeal the General Counsel's decision to the administrative law judge, who can and should ensure that our concerns for expeditious casehandling and fair play are taken into account, we find no reason to impose a blanket rule requiring consolidation of pending cases in all but the most unusual circumstances.[4]

Finally, even if we were to agree with our colleague that the cases before us should have been consolidated with Case 20–CB–9949, we still would reject his view that the complaint should be dismissed. As we have noted, parties may file motions for consolidation with the judge presiding at a hearing. That approach was available to the Respondent. It is undisputed that the complaint in this proceeding had issued before the hearing before Judge Wieder commenced in Case 20–CB–9949. The Respondent could, therefore, have moved in Case 20–CB–9949 that the proceedings be consolidated, and Judge Wieder could have ruled on the motion. According to the unrebutted assertions in the General Counsel's brief, however, the Respondent made no attempt to have the CC and CB cases consolidated. Instead, it waited for the hearing in this case and moved for dismissal of the complaint.[5]

An unfair labor practice proceeding, it must be remembered, is the only vehicle for adjudicating the claims of parties and for the Board to enforce the policies of the Act. Granted, the parties' rights to procedural fair play are also important, as are our concerns for efficiency and conservation of the Board's resources. However, even when the General Counsel fails to consolidate cases that normally should be consolidated, in the absence of a showing of prejudice to a party we are reluctant to dismiss the complaint and thereby sacrifice other parties' substantive rights under the Act. This is especially true when, as in this case, the first party only belatedly invokes its procedural interests.[6]

Applying these principles here, we find that the instant complaint cases involving unlawful picketing in violation of Section 8(b)(4)(i) and (ii)(B) is not an attempt by the General Counsel to relitigate the allegations in Case 20–CB–9949 alleging improper union organizing and card solicitation by a supervisor in violation of Section 8(b)(1)(A) of the Act. Moreover, the mere common identity of the parties in Case 20–CB–

[4]The dissent argues that if the General Counsel attempts to consolidate cases and a party opposes the attempt, the judge may prevent consolidation if he agrees with the opposing party. That proposition is unexceptionable, being fully consistent with the Board's rules. What the dissent inexplicably overlooks is that the same rules also contemplate that the General Counsel may determine that consolidation is not appropriate, subject to review if the judge agrees with a party favoring consolidation. We cannot understand why the dissent would replace the existing, and perfectly workable, procedural system with one that would force the General Counsel to opt for consolidation in practically all cases.

[5]The hearing in Case 20–CB–9949 closed in August 1995. The hearing in this proceeding commenced in October 1995. On motion by the Charging Party, filed in September, the hearing in Case 20–CB–9949 was reopened in November, 1995. Thus, it is evident that the Respondent never intended to try to have the CC and CB cases consolidated in one proceeding. Instead, its apparent intention was to ''sandbag'' the General Counsel by ignoring the issue until it was too late to consolidate the cases, and then arguing that the CC complaints should be dismissed. We take a dim view of such tactics.

[6]See *Teamsters*, 130 NLRB at 1023. Even if the Respondent were to argue (and it does not) that it was prejudiced by the General Counsel's decision to litigate the CC and CB cases separately, we would view that argument askance given that the Respondent did not attempt to have the cases consolidated.

9949 is insufficient to require consolidation here. For these reasons, we affirm the judge's decision to deny the Respondent's motion to dismiss the complaints.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Service Employees Union Local 87, Service Employees International Union, San Francisco, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(a) and (b).

''(a) Within 14 days after service by the Region, post at its business office and meeting halls located in San Francisco, California, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

''(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.''

MEMBER HIGGINS, dissenting.

I would not allow the General Counsel to ''piecemeal'' litigate this case, in circumstances where the case clearly should have been consolidated with a prior case.

In *Peyton Packing Co.*, 129 NLRB 1358 (1961), the Board declared:

> Generally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in unnecessary harassment of respondents.

In *Jefferson Chemical Co.*, 200 NLRB 992 (1972), the Board said:

> We believe that such multiple litigation of issues which should have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes and that we should not permit it to occur.

I believe that these principles are as sound today as they were when they were originally pronounced 35 years ago. Indeed, at a time of severe budgetary constraint, the policy is even more relevant. Accordingly, one would hope for a strong reaffirmation of these principles.

My colleagues have chosen not to reaffirm these principles. To the contrary, they reverse them, overruling at least two cases in the process. Since the policies are sound, and are particularly relevant today, I dissent.

The instant case illustrates the point. In August of 1995, when the hearing in Case 20–CB–9949 opened, there were two outstanding complaints against Respondent. The complaint in the case going to trial (Case 20–CB–9949) was issued on June 14, 1995, and the complaint in Case 20–CC–3284, et al., was issued on July 18, 1995. Both grew out of Respondent's primary dispute with Charging Party GMG. Inexplicably, the General Counsel chose to litigate the CB case separately, leaving until later the litigation of the CC case. The result was two trials before two judges, and two separate decisional routes. Under established and sound precedent, there was no warrant for this approach.[1]

My colleagues rely on Section 102.33 which vests the General Counsel with discretion in regard to consolidation and severance of charges before him. While I agree that the General Counsel has and should have considerable discretion with respect to such matters, the fact that the General Counsel may wish to consolidate cases (or not consolidate them) does not, and cannot, strip *the Board* of its inherent power to control its own docket. Indeed, it would be a strange judicial system in which the prosecutor could dictate to the court the timing or order in which cases are to be heard. The final sentence of Section 102.33 makes clear the Board's power: the judge and the Board are the arbiters of these matters.

Where, as here, complaints against a single respondent have issued in two cases prior to the trial of either, the Board can and should require that they be consolidated for trial. That however, does not end the matter. First, the charging party or respondent can, of course, oppose a General Counsel's motion to consolidate. And the judge, on a showing of special circumstances, can agree with them. If so, the General Counsel would not be precluded from later prosecuting a second case. Secondly, as to charges filed during the trial of the first case, there would be no obligation on the part of

[7] We disavow the judge's statement that ''as a matter of law,'' the General Counsel will never be required to consolidate allegations of violations of Sec. 8(b)(4) with allegations of violations of other sections of the Act.

[1] There is nothing in the language or logic of the aforementioned *Jefferson Chemical* and *Peyton Packing* principles to suggest that they are confined to ''related'' or ''closely related'' allegations. Thus, in my view, there is no necessity to resolve whether the ''CP'' and ''CC'' allegations herein were ''related'' or ''closely related.''

the General Counsel to add complaints based on these charges. Any party may seek to do so, and the judge would then rule on the motion. Third, the policy requires only the consolidation of all outstanding *complaints*. Thus, if the General Counsel is faced with a continuing series of charges against a respondent, he need not postpone litigation until the flood has subsided or until a prosecutorial decision is made on all charges. Rather, at a point in time, the General Counsel can gather together all complaint-worthy cases, issue complaints, and proceed to trial, leaving until a later trial other pending charges that may turn out to be complaint-worthy. Finally, even where complaints have issued in a mammoth series of cases, the General Counsel may choose not to litigate all of them in one proceeding. In this regard, I do not read the *Jefferson Chemical* and *Peyton Packing* principles as being so rigid as to preclude an exception for unusual circumstances. To the contrary, they are common sense principles for ensuring efficiency of casehandling for all parties involved. If the application of these principles in a particular case would result in undue delay in casehandling, they must give way in the unusual or special circumstances of that case.

My colleagues argue that, under *Maremont*[2] and *Harrison*,[3] ''charges filed during the pendency of another unfair labor practice proceeding involving the same respondent'' need not be consolidated with that proceeding. I certainly agree with that policy but that policy is not applicable here. Rather, where, as here, a charge and complaint are filed prior to the proceeding, there is a clear warrant for consolidation, and there is no basis for separate trials.

Finally, my colleagues make much of the fact that Respondent did not move to consolidate the second case with the first case. However, the whole point of *Peyton* and *Jefferson* is that *the Board* has its own interest in judicial efficiency and economy. Thus, quite apart from the interests of a private party, the Board has a personal interest in conservation of scarce resources. As noted above, at a time of severe budgetary constraint, we should not be abandoning these principles, and this is true without reference to the whims of individual litigants.

For the reasons set forth above, the two complaints in this case, pending at the opening of the hearing in the first case, should have been litigated in case no. 1. Under well-established and sound principles, I would not permit ''piece-meal'' litigation of the second case.

[2] 249 NLRB 216.

[3] 255 NLRB 1426.

Boren Chertkov, Esq., for the General Counsel.

Paul D. Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondent, Service Employees Union Local 87.

Stephen R. Lueke, Esq. (Ballard, Rosenberg & Golper), of Universal City, California, for the Charging Party, Cresleigh Management, Inc.

David F. Byrnes and *Alan M. Pittler, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Charging Party, GMG Janitorial Maintenance, Inc.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in trial in October and November 1995, in San Francisco, California. Briefs were submitted in February 1995. The matter arose as follows.

On March 8, 1995, Cresleigh Management, Inc. (the Charging Party Cresleigh or Cresleigh) filed a charge, docketed as Case 20–CC–3284, against Service Employees Union, Local 87, Service Employees International Union, AFL–CIO (the Respondent or the Union). On April 7, 1995, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing respecting the charge. On April 6, 1995, GMG Janitorial, Inc. (the Charging Party GMG or GMG) filed a charge against the Union, docketed as Case 20–CC–3287, and amended the charge on May 17, 1995. On April 26, 1995, the Regional Director issued a complaint and notice of hearing respecting the charge. GMG filed a second charge on June 13, 1995, docketed as Case 20–CC–3290, against the Union and amended the charge on June 20 and 29, 1995. On July 18, 1995, the Regional Director issued a complaint and notice of hearing respecting the charge and an order consolidating the three cases for a common hearing.

The complaints as amended at the hearing allege that the Respondent violated the provisions of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by engaging in unlawful secondary activity at various locations within the City and County of San Francisco essentially in the spring of 1995. The Respondent in its amended answer denies that it has violated the Act.

FINDINGS OF FACT

Upon the entire record, including posthearing briefs from the General Counsel, the Charging Party GMG, the Respondent, and my observation of the witnesses and their demeanor, I make the following findings of fact[1]

I. JURISDICTION

At all material times, the Charging Party Cresleigh has been a California corporation with an office and place of business in San Francisco, California. Cresleigh is engaged in the management of office and commercial buildings. Based upon projected operations Cresleigh annually enjoys revenues from tenants, each of whom satisfies the Board's direct standard for purposes of asserting jurisdiction, of an amount in excess of $100,000. I find that Cresleigh at all times material has been a person and an employer engaged

[1] There were few evidentiary conflicts. Where not otherwise noted, the findings are based on the admitted pleadings, the stipulations or admissions of counsel and uncontested, credible testimonial, or documentary evidence.

in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Charging Party GMG has been a California corporation with an office and places of business in San Francisco, California. GMG is engaged in the business of providing janitorial and maintenance services to offices and commercial buildings. GMG enjoys annual revenues from clients, each of whom satisfies the Board's direct standard for purposes of asserting jurisdiction, of an amount in excess of $50,000 and has a gross volume of business in excess of $500,000. I find that GMG at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Ritz-Carlton and the property managers attending the meeting discussed below, the United Savings Bank and its tenants, and Frank Boides and Associates are persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4)(ii)(B) of the Act.

II. LABOR ORGANIZATION

Based on the admissions in the pleadings, I find the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Threshold Defense Motion to Dismiss*

On April 17, 1995, the Charging Party GMG filed a charge, docketed as Case 20–CB–9949, against the Respondent alleging improper union organizing and card solicitation by a supervisor of GMG at certain San Francisco locations in violation of Section 8(b)(1)(A) of the Act. A complaint was issued by the Regional Director on June 14, 1995, with the matter being set for hearing initially on June 29, 1995. Following postponements the case was heard in August 1995 by Administrative Law Judge Joan Wieder, closed by her and thereafter on motion reopened in November 1995 and closed thereafter. That matter is now before her pending issuance of her decision.

Based on an asserted temporal and subject matter overlap of Case 20–CB–9949 and the instant cases, the Respondent moves that I dismiss the instant cases under the Board's holdings in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and *Peyton Packing Co.*, 129 NLRB 1358 (1961). The Charging Party GMG and the General Counsel argue that the CC and CB allegations deal with differing factual contexts with only slight geographical overlap. They argue, in essence, that as a matter of law there is not a sufficient legal nexus between allegations of violations of Section 8(b)(1)(A) and 8(b)(4)(ii)(B) of the Act to invoke the mandatory consolidation provisions of *Peyton* and *Jefferson*. GMG also argues that the Respondent raised the defense untimely.

The Board in *Peyton Packing*, addressed a situation where the General Counsel had separately litigated two complaints: the earlier complaint contending that an employer bonus to employees was a violation of Section 8(a)(1) of the Act and that the strike involved was an unfair labor practice strike and the later complaint contending that the bonus was a violation of Section 8(a)(5) of the Act and, as amended at the hearing, that the strike was an unfair labor practice strike.

The Board ruling on the latter complaint found the relitigation of the bonus and the unfair labor practice strike to be improper. The Board held at 1360:

> Generally speaking, sound administrative practice, as well as fairness to respondents, requires that consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but one single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondents. [Footnote omitted.]

The Board found such multiple litigation to be an abuse of process and held it would not be permitted to occur in *Jefferson Chemical Co.*, supra, now the lead case in the area. In *Jefferson* two complaints had been issued alleging bargaining violations of Section 8(a)(5) of the Act. The Board held at 992 fn. 3:

> We believe that such multiple litigation of issues that should have presented in the initial preceding constitutes a waste of resources and an abuse of our process and that we should not permit it to occur.

In *Highland Yarn Mills*, 310 NLRB 644, 644–645 (1993), the Board restated the ''closely related'' portion of its multiple litigation prohibition standard:

> [O]nce a respondent has made a prima facie showing under *Jefferson Chemical*, we believe the burden shifts to the General Counsel to rebut that showing. More particularly, if a respondent shows that the allegations of a ''new'' complaint pertain to events that occurred prior to the hearing in an earlier case and that these new allegations are closely related to the allegations of the earlier case, the burden shifts to the General Counsel to show . . . that the allegations of the new complaint are not closely related to the allegations of the earlier case.

The General Counsel cites the Board's decision in *Teamsters after Peyton* and held, reversing the administrative law judge, that two different complaints litigating violations of Section 8(a)(4) were not so related that the latter case should be dismissed for failure to consolidate it with the former. The majority held that *Peyton* required a common act at issue in each of the multiple complaints to trigger dismissal of a second complaint whereas in *Overnight* there were multiple, separate acts, no one of which was the common subject of the two proceedings. The General Counsel also cites *Maremont Corp.*, 249 NLRB 216 (1981), and *Harrison Steel Castings Co.*, 255 NLRB 1426 (1981), for the proposition that the General Counsel has discretion to consolidate or not wherever there are differing factual and legal settings to charges and complaints.

Rejecting the argument of GMG, I find that counsel for the Respondent timely raised the issue discussed here. I do not, however, find the allegations of the instant complaints so related to the matters at issue in Case 20–CB–9949, now before Judge Wieder, as to trigger the prohibitions of *Peyton* and *Jefferson Chemical*. Rather, I find as a matter of law, independent of the factual allegations at issue in each of the

two matters, that the provisions of Section 8(b)(4), with its significantly different legal approach and legislative history as well as its differing standards respecting ''persons'' and special status under Sections 10(1) and 10(m) of the Act, render allegations of violations of Section 8(b)(4) of the Act immune from being dismissed as abusive multiple litigation when they are not consolidated by the General Counsel with non-8(b)(4) cases. Thus, I find that any and all 8(b)(4) cases will always be, by the nature of the statute, sufficiently unrelated to any and all non-8(b)(4) cases so as to withstand a motion to dismiss under *Peyton* and *Jefferson Chemical* irrespective of the underlying facts in the complaints as they apply to such legally different contentions.

Given my findings that as a matter of law allegation of violations of Section 8(b)(4) need not be consolidated with allegations of violations of other sections of the Act, I shall not dismiss or otherwise fetter the General Counsel's litigation of the instant consolidated case. The Respondent's motion to dismiss is denied.

B. *Facts*[2]

1. Background

On September 20, 1993, the Board in *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715 (1993), a lengthy multicomplaint case, found that the Respondent had violated Section 8(b)(4) in various ways during a 15-month period running from June 1990 through August 1991. The background and the existence of a campaign in the City of San Francisco by the Union at relevant times are not in dispute nor are the occurrence of the events in question on the dates in question. It is appropriate to turn to the individual allegations alleged in the complaint.

2. Case 20–CC–3284

In mid-January Cresleigh took over the management of the 433 California building—a San Francisco commercial building, did not assume prior management's contracts with janitorial concerns for the provision of janitorial services, and put its own janitorial employees in place. The former janitorial service provider's janitorial employees, who worked at the site and who were let go as a result of Cresleigh's actions, were represented by the Union. In January and February the Union sought first reinstatement of the former janitors and thereafter that Cresleigh sign a collective-bargaining agreement respecting its janitorial employees. Picketing of the premises by the Union occurred during this period which is not under challenge.

On Friday, March 3 Cresleigh contracted with GMG to perform janitorial services at 433 California commencing on March 6. Cresleigh's agreement specified that GMG employees would not be present at the site from 8 a.m. to 7 p.m. This schedule was intended to reduce the possibility of ''disruption'' by picketing during the business day.

After the close of business on Friday, March 3,[3] Cresleigh sent to the Union by facsimile transmission a copy of a letter which stated in part:

> Effective 8 a.m. March 4,1995, Cresleigh will no longer employ any of its own employees to perform janitorial services at 433 California. GMG janitorial staff will be working at the 433 California location between the hours of 5 a.m. - 8 a.m. and from 7 p.m. - 3 a.m., Monday through Friday commencing on March 6,1995. . . . No GMG managers, supervisors, agents or employees will be at the premises located at 433 California Street at any time(s) other than those noted above. Please confine picketing by your Union, if any, to appropriate times and locations.

The Respondent picketed the 433 California Building on March 6 from about 11 a.m. through 6 p.m. with picket signs asserting, inter alia:

CRESLEIGH/ROCKLAND DEVELOPMENT
STRIKE LOCAL 87
NO DISPUTE WITH ANY OTHER PERSON

and

SAN FRANCISCO CONTRACTORS ASSOCIATION
STRIKE LOCAL 87
NO DISPUTE WITH ANY OTHER PERSON, SEIU

and

UNFAIR

On March 8, 1995, the Union again picketed the 433 California building commencing in the late morning. The picket signs bore, inter alia, the following legends:

UNFAIR, UNFAIR
LOCAL 87 Service Employees International Union, AFL–CIO

and

GMG JANITORIAL UNFAIR
SERVICE EMPLOYEES INT. UNION, AFL–CIO

and

WEST BAY BID. MAIN., STRIKE, LOCAL 87
SERVICE EMPLOYEES INT. UNION, AFL–CIO

and

CRESLEIGH/ROCKLAND

A crowd of demonstrators[4] entered the building lobby *en masse* shouting and using bullhorns and noisemakers. The lobby was filled with the demonstrators whose numbers pressed the lobby occupants to the rear. The demonstrators chanted various protests[5], handed out and littered the area with literature, and after a time departed.

The Union argues that GMG maintained a daytime janitor at 433 California at relevant times. The Respondent's basis

[2] The dates refer to 1995 unless otherwise indicated.

[3] Documentary evidence established the facsimile transmission occurred at 5:17 p.m.

[4] There was no real dispute and on this record I find that the demonstrators were union agents and that the Union was responsible for their conduct in the events involved.

[5] The slogans included: ''no contract, no peace,'' ''tear it down, tear it down, San Francisco, union town,'' etc.

for this argument is General Counsel's Exhibit 19. This document is a memorandum from GMG to Cresleigh dated March 10 reporting about events on the evening of March 8. The memorandum continues to describe an undated event in which a Daytime had been confronted by ''one of the union people.'' I find the memo is not sufficient evidence of the presence of a GMG employee at 433 California at relevant times to overcome the testimony of the General Counsel's and the Charging Parties' witnesses that no such employees were either authorized nor known to have been on the premises during business day hours. Rather, l find that during the period of March 6 through there were no GMG employees at 433 California during the 8 a.m.–7 p.m. period.

3. Case 20–CC–3287

The Ritz-Carlton Hotel is located on the corner of Stockton and California Streets in San Francisco. On April 6, West Bay Building Maintenance, Inc., a janitorial contractor which has been involved in a labor dispute with the Union, held a luncheon at the hotel for about representatives of property management firms. GMG was not involved in the gathering although it retains the same law firm as West Bay and certain of that law firm's staff were present.

In the late morning a crowd of 200 to 300 union[6] demonstrators approached the hotel and commenced picketing and demonstrating by marching in an elongated loop in the front area of the hotel. Picket signs, sandwich boards and placards read, inter alia:

GMG BUILDING MAINTENANCE, UNFAIR, STRIKE, LOCAL 87

and

WEST BAY BUILDING MAINTENANCE, LOCAL 87, ON STRIKE

and

SAN FRANCISCO CONTRACTORS ASSOCIATION, ON STRIKE, LOCAL 87

The demonstrators shouted, chanted, and utilized noise makers. Slogans included ''West Bay got to go'' and associated admonitions. The union demonstration lasted for the better portion of an hour. Thereafter the demonstrators marched on to a separate area.

4. Case 20–CC–3490

The 711 Van Ness Avenue building is a five story office building located at the corner of Van Ness and Turk in San Francisco housing the headquarters of the United Savings Bank (the bank) and other commercial tenants. Located at the street corner is the bank's main entrance. About 100 feet west on Turk street is the structure's garage entrance. Some 40 feet north on Van Ness is a separate entrance for other building tenants.

Since April 1995, the building has been managed by Frank Boides & Associates (Boides). Prior to April GMG, held a contract for the provision of janitorial services at the building. In early April, the bank and, through the bank, Boides received a letter from the Union urging it not to contract with GMG or other nonunion janitorial services and noting that the Union had an ongoing dispute with GMG and might picket. In any event Boides negotiated an extension of the GMG agreement to provide janitorial services at 711 Van Ness and such services were thereafter provided.

In mid-April the Union began picketing and handbilling the 711 Van Ness Avenue building with signs identifying GMG as the party with whom it had a dispute. Agents of the bank and Boides met with union officials, but no resolution occurred and the picketing and handbilling continued. This conduct is not under challenge.

In late April, Boides established a reserved gate system at 711 Van Ness. The Turk Street garage entrance was posted with a sign stating:

> Employees, agents, representatives and suppliers of GMG Janitorial may use ONLY this entrance to this building. Employees, agents, representatives and suppliers of GMG Janitorial may NOT use the 711 Van Ness Entrance to this building or any other entrance. [Emphasis in original.]

The bank's main entrance and the separate entrance on Van Ness were posted with signs asserting:

> Employees, agents, representatives and suppliers of GMG Janitorial may *not* use this entrance to this building for any purpose. This entrance is reserved for all other individuals and companies doing business with tenants of 711 Van Ness Avenue. Employees, agents, representative and suppliers of GMG Janitorial *must* use the rear entrance to this building, located through the garage entrance on Turk Street. [Emphasis in original.]

Boides communicated the creation, implementation, and intended enforcement of the reserve system to its security staff, the Union, and GMG at the end of April. The signs remained posted and the reserve gate system enforced thereafter at all relevant times. There is no evidence that the entrances were used in a manner inconsistent with the instructions posted.

On June 13, two union agents established a table near the bank entrance bedecked with placards asserting, inter alia: ''Justice for Janitors'' and ''Hey, hey, ho, ho, Union busters got to go—GMG.'' The person at the table distributed union literature. The other agent patrolled at the bank entrance with a sign that asserted: ''GMG Janitorial—Unfair-Local 87.'' On another occasion the same or a similar sign was propped up at the corner light post. When an agent of Boides protested the picketing of the bank entrance, one of the two union agents asserted they had been told to picket the bank entrance and would remain there. Similar conduct occurred on June 28 and 29.

C. *Analysis and Conclusions*

The General Counsel and the Charging Parties argue that the instant complaint allegations addressing conduct starting in March 1995 are but a continuation of an earlier ongoing campaign of wrongful secondary conduct by the Union which is presented in detail in *Service Employees Local 87*

[6] The demonstrators were led by agents of the Union and on this record there is no doubt and I find the Union is responsible for the actions of the demonstrators in the context of the charges.

(Trinity Maintenance), 312 NLRB 715 (1993). The Union argues rather that the Union's earlier actions are long past and irrelevant to these proceedings. More specifically, counsel for the Union argues that it ''sought to, and succeeded in, engaging in lawful conduct for many months (from March through July, 1995)'' and that the instant case involves at most some ''technical violations induced by the sharp practices of [the Union's opponents].

The record evidence is largely undisputed respecting what occurred during the events in question. Learned briefs replete with detailed analysis of the facts and applicable law were submitted. It is unnecessary to set forth the legal analysis in detail respecting the individual allegations of the complaint because essentially identical legal and factual arguments have been made by the parties, analyzed at length by Administrative Law Judge Burton Litvack and definitively resolved by the Board in *Service Employees Local 87 (Trinity Maintenance)*, supra. Relying on this body of scholarly guidance, where not otherwise indicated, I shall address the complaints separately below.

1. Complaint in Case 20–CC–3284

The complaint in Case 20–CC–3284 alleges that the Respondent's picketing and demonstration on March 6 and 8 at the 433 California building occurred at a time when no GMG employees were present and that the Respondent well knew that fact was true at the time it engaged in the conduct. The General Counsel's complaint further alleges that the conduct blocked ingress and egress to the building and forced the security staff to the back of the lobby as a result of the ''surge, en masse, into the lobby'' on March 8.

The General Counsel alleges that this conduct had as an object, to force or require Cresleigh to cease doing business with GMG and/or to force the tenants of 433 California to cease doing business with Cresleigh in order to force or require Cresleigh to cease doing business with GMG. This conduct is alleged to violate Section 8(b)(4)(i) and (ii)(B) of the Act.

The Respondent argues that, in fact, GMG employees were present at all relevant times. I have rejected this factual argument, above. The Respondent argues further it should not in the circumstances presented be held to have knowledge that GMG employees were not present because the notice it received was untimely. I also reject this argument on the facts. The Union had in all events received the Friday facsimile transmission from Cresleigh at the time it opened for business on Monday, March 6. Sufficient time passed thereafter for the Union to be charged with knowledge of the letter's contents at the time it picketed 433 California in the late afternoon that day. The events of March 8, 2 days' later, were even more clearly undertaken with actual or constructive knowledge of the communication.

Given all the above, I find the conduct of the Respondent on March 6 and 8, 1995, at the 433 California building violates the Act as alleged in the complaint in Case 20–CC–3284. *Service Employees Local 87 (Trinity Maintenance)*, supra.

2. Complaint in Case 20–CC–3287

The complaint in Case 20–CC–3287 alleges that on April 6, 1995, the Union picketed The Ritz-Carlton at a time when GMG had no presence at the facility. The complaint further alleges that an object of the conduct was to force or require GMG to recognize and bargain with the Union as the representative of its employees even though it had not been certified as such a representative. The complaint further alleges this conduct violates Section 8(b)(4)(i)(ii)(B) of the Act.

Counsel for the Respondent makes two arguments. First, he argues that there is insufficient evidence of patrolling, picketing or inducing persons not to leave or enter. I have carefully examined the videotape of the events entered into evidence and find the conduct of the demonstrators easily meets the Board's standards in this regard. Second, counsel for the Respondent on brief at argues that the individuals present at The Ritz-Carlton meeting were the opponents of the Union and were the determinants of GMG and others' policies of ''getting rid of union janitors throughout the City of San Francisco.'' The Respondent argues that since they ''were also labor representatives for GMG . . . the carrying of signs that said GMG was entirely appropriate.'' Counsel for the Respondent's latter argument finds no support in the law.

Given all the above, I find the conduct of the Respondent on April 6, 1995, at The Ritz-Carlton Hotel violates the Act as alleged in the complaint in Case 20–CC–3287. *Service Employees Local 87 (Trinity Maintenance)*, at 715.

3. Complaint in Case 20–CC–3290

The complaint in Case 20–CC–3290 alleges that on June 13, 28, and 29, 1995, the Respondent picketed at the 711 Van Ness building at reserved gates restricted to other GMG employees and related individuals. The General Counsel alleges that this conduct had as an object, to force or require the bank and Boides to cease doing business with GMG and/or to force the tenants of 711 Van Ness to cease doing business with the bank and Boides in order to force or require the bank and Boides to cease doing business with GMG. This conduct is alleged to violate Section 8(b)(4)(i) and (ii)(B) of the Act.

The Respondent on brief argues first that the evidence will not support a finding of unlawful picketing. Second, the Respondent argues that, even when viewed most favorably from the General Counsel's perspective, during a lawful 4-month campaign at the 711 Van Ness building, the General Counsel has established, but a few ''inadvertent incidents'' of noncompliance with ''the arbitrary strictures of *Moore Drydock*.'' (R. Br. at 6.)

Considering the essentially unchallenged testimony of events as well as the cases cited by the moving parties, I find that the General Counsel has met his burden of showing the Respondent did in fact undertake the conduct alleged in the complaint and that it violates the Act as alleged. *Service Employees Local 87 (Trinity Maintenance), supra.*

THE REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. More particularly, l shall follow the relevant remedial provisions of *Service Employees Local 87 (Trinity Maintenance)*, supra at 715.

The General Counsel and the Charging Parties urged and the Respondent opposed inclusion of a broad cease-and-desist order in any directed remedy. This issue is a reprise of the arguments definitively treated in *Trinity*. Judge Litvack's analysis, specifically adopted by the Board, addresses the issue in some detail and will not be repeated here. Simply put, Judge Litvak found a broad order was appropriate in *Trinity* because the Board had found earlier conduct of the Union improper. That earlier conduct had been found improper less than 2 years before the occurrence of the conduct at issue before him. The conduct found violative in the instant case occurred less than 2 years after the Board's decision in *Service Employees Local 87 (Trinity Maintenance)*, supra. The timing in this respect is no different. Accordingly, a broad order will be included.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole, I make the following conclusions of law.

1. The Charging Party Cresleigh Management, Inc. at all times material has been a person and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party GMG at all times material has been a person and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Ritz-Carlton and the property managers attending the meeting at The Ritz Carlton as discussed above, the tenants of the 433 California building, the United Savings Bank, the tenants of the 711 Van Ness building, and Frank Boides and Associates are persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4)(ii)(B) of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The Union violated Section 8(b)(4)(i) and (ii)(B) of the Act by the following acts and conduct:

(a) By picketing The Ritz-Carlton Hotel in furtherance of its dispute with GMG notwithstanding that at the time it engaged in its conduct, GMG was not present at the Hotel.

(b) By picketing and entering en mass the 433 California Building in furtherance of its dispute with GMG notwithstanding that at the time it engaged in its conduct. GMG was not present at the location.

(c) By picketing reserved entrances of the 711 Van Ness Building in furtherance of its dispute with GMG notwithstanding that at the time it engaged in its conduct, GMG was not using nor authorized to use said entrances.

6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

ORDER

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

The Respondent, Service Employees Local 87, Service Employees International Union, AFL–CIO, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from picketing or any similar or related conduct or in any other manner inducing or encouraging any individual employed by The Ritz-Carlton Hotel or its luncheon customers and clients, Cresleigh Management, Inc., the tenants of the 433 California building, the tenants of the 711 Van Ness building, Frank Boides & Associates, the United Savings Bank, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services where objects thereof are to force or require Cresleigh Management, Inc., Frank Boides & Associates, the United Savings Bank, or any other person to cease doing business with GMG Janitorial Maintenance; or to force or require any person or persons to pressure or to cease doing business with The Ritz-Carlton Hotel or its luncheon customers and clients, Cresleigh Management, Inc., the tenants of the 433 California building, the tenants of the 711 Van Ness building, Frank Boides & Associates, the United Savings Bank, or any other person engaged in commerce or in an industry affecting commerce in order to force or require the latter persons, in turn, to cease doing business with GMG Janitorial Maintenance, or any other person.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office and all meeting halls located in San Francisco, California, copies of the attached Notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees and union members, after being signed by the Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered. defaced or covered by other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT by picketing or any similar or related conduct or in any other manner, induce or encourage any individual employed by The Ritz-Carlton Hotel or its luncheon customers and clients, Cresleigh Management, Inc., the tenants of the 433 Califomia Building, the tenants of the 711 Van Ness Building, Frank Boides & Associates, the United Savings Bank, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services where objects thereof are to force or require Cresleigh Management, Inc., Frank Boides & Associates, the United Savings Bank or any other person to cease doing business with GMG Janitorial Maintenance; or to force or require any person or persons to pressure or to cease doing business with The Ritz-Carlton Hotel or its luncheon customers and clients, Cresleigh Management, Inc., the tenants of the 433 California Building, the tenants of the 711 Van Ness Building, Frank Boides & Associates, the United Savings Bank, or any other person engaged in commerce or in an industry affecting commerce in order to force or require said latter persons, in tum, to cease doing business with GMG Janitorial Maintenance, or any other person.

SERVICE EMPLOYEES LOCAL 87, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO